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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALLEN ANDRE BOONE, Defendant and Appellant.	B201680 (Los Angeles County Super. Ct. No. BA290099)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson, and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Allen Andre Boone appeals from the judgment entered following his convictions by jury on count 2 – criminal threats (Pen. Code, § 422) with firearm use (Pen. Code, § 12022.5, subd. (a)) and count 4 – vandalism causing damage under $400, with admissions that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 10 years 8 months. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

a. *Count 2 (Victim Leverett).*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that prior to September 7, 2005, Joy Henry lived in a house on 74th Street in Los Angeles, and Dynell Leverett learned there was an issue as to whether Henry had been timely paying rent for the house. On September 7, 2005, Leverett lived with Henry and her two children in the house. About 7:30 p.m., Leverett was on the porch. Appellant, who was on the sidewalk, asked Leverett, "Where is my mother fucking money at?" Appellant, apparently referring to Henry, also said to Leverett, "Your bitch called the police on me."

The prosecutor later asked Leverett what appellant said to Leverett. Leverett testified, "[appellant said] I be back with my homies. I am going to take all your shit and throw it outside. We don't give a fuck about who is in the house. And you ain't going to stay here for free. And he said I be back . . . ." Leverett also testified, "[Appellant] also said that he's going to come back and he's going to shoot the mother fucking house up . . . ."

According to Leverett, appellant pulled up his shirt, and Leverett saw a black gun handle protruding from the waistband of appellant's pants.

Leverett was afraid, ran inside the house, and told Henry to get down because appellant had a gun. Leverett brought Henry's children from the bedroom to the living room. He was not sure if appellant would return and start shooting. Meanwhile, Henry

had called 911. Leverett told the dispatcher what had happened. Leverett, Henry and the children later left the house, afraid that appellant would return and start shooting. A few months after the above incident, Leverett and Henry moved out of the house.

b. *Count 4.*

On September 11, 2005, police officers saw appellant. Appellant saw them and fled. The officers detained appellant following a foot pursuit, and transported him to the police station. After an officer took appellant's fingerprints, appellant took his right thumb, which still had ink on it, and wrote the numerals "73" on a wall at the station.

c. *Other Crimes Evidence*.

On April 29, 2005, Frances Kenneth was renting a home on 91st Street. Appellant was the landlord. About 8:00 a.m., appellant came to Kenneth's front door and said, "'Bitch, why didn't you bring my trash can in?'" Kenneth told appellant to take his own trash cans inside. Appellant cursed at her and told her she should have brought in his "mother fucking trash cans" since she had brought in hers. Appellant said, "Bitch, I'll be back," then left.

About 9:00 or 10:00 a.m., appellant entered Kenneth's home uninvited. Kenneth testified, "[Appellant] said I am going to get you out of here, bitch. You don't do nothing here so your ass is getting out of here right fucking now. Now if you aren't getting out of here, I am going to get my homeboys on your mother fucking house and I am going to kick your mother fucking ass out of your house." Appellant "came in [Kenneth's] face" and was spitting in her face while talking to her.

When appellant said he was going to get his homeboys, Kenneth understood this to mean that appellant was going to get his friends and jump on her. Appellant also said he was going to "fuck [Kenneth] up," which she understood to mean that appellant was going to beat her up.

Kenneth asked appellant to leave. She testified that appellant told her that "no bitch is going to tell me to get out of my own mother fucking property." Kenneth's handicapped son confronted appellant, pushed him towards the door, and appellant left.

Appellant returned a third time that day and again threatened Kenneth, who called the police.

2. *Defense Evidence.*

In defense as to count 2, Leverett told a police officer that the gun which Leverett had seen had a brown handle. Tyrone Boone (Tyrone), appellant's brother, testified he owned the house where Henry lived, and Henry and Leverett had been in arrears in their rent. Paulette Jordan, appellant's fiancée, testified that Henry and Leverett told Jordan that the two had found a place to stay, the place cost $3,000, and if appellant and Jordan gave that amount to Henry and Leverett, the latter two would not come to court.

In 1974, Kenneth committed the offense of carrying a concealed weapon, and in 1987, she committed the offense of carrying a knife into a courthouse. Tyrone had experienced tenancy issues with Kenneth.

CONTENTIONS

Appellant presents related claims that (1) his statements about his gang membership and fellow gang members were inadmissible at the trial, and (2) he was denied effective assistance of counsel if it is determined that his trial counsel failed to properly object to the introduction of the statements. Appellant also claims (1) there was insufficient evidence supporting his conviction on count 2, and (2) the trial court erroneously denied his motion for a new trial based on newly discovered evidence.

DISCUSSION

1. *Appellant's Statements About His Gang Membership and "Homies" Were Admissible, and He Was Not Denied Effective Assistance of Counsel.*

a. *Pertinent Facts.*

The amended information alleged as counts 1 through 3 that on August 31, September 7, and September 11, 2005, respectively, appellant committed the offense of criminal threats in violation of Penal Code section 422. Henry was the victim alleged as to counts 1 and 3, and Leverett was the victim alleged as to count 2. The amended information alleged as count 4 that on September 11, 2005, appellant committed

vandalism causing damage under $400 in violation of Penal Code section 594, subdivision (a).

After jury selection, but before opening statements, the prosecutor, during an Evidence Code section 402 hearing, indicated she wished to introduce evidence of appellant's statement that he was a member of the Seven-Trey Hustlers. The prosecutor argued the statement was part of the threats which appellant made to the victims. Appellant appeared to argue that any evidence pertaining to the Seven-Tray Hustlers, other than appellant's statement about them, was excludable under Evidence Code section 352.[1]

The court indicated its understanding that appellant said something to the effect that, "I am going to get you out of here. My homies, Seven-Trey . . . ." Appellant agreed. The prosecutor indicated this was "the very essence of [appellant's] threats."

The court indicated that the words appellant used were admissible. The court also indicated that appellant's statement was admissible on the issue of whether appellant intended to cause the victims to suffer sustained fear. The court further indicated that evidence that the victims knew what the term "Seven-Trey" meant was admissible on the issue of whether they suffered sustained fear. The prosecutor commented that the victims knew appellant was a member of the Seven-Trey gang because he admitted this, because of his reputation, and because they previously had known appellant was a member of the gang. The prosecutor commented, "[Appellant's] saying not only am I a Seven-Trey Hustler, but I am going to get my homies to come back and do this to you." Appellant argued the victims had no previous history with appellant during which they could have learned that he was a gang member.

At trial, Henry testified as follows. On August 31, 2005, appellant came to Henry's home and politely asked her to pay rent. She did not then pay appellant rent. Appellant came to Henry later that day, asked if she had the rent, and Henry said no. Appellant then said, ". . . I am from Seven-Trey Hustlers and I am going to get my

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[1] Appellant's counsel argued "any reference to Seven-Trey Hustlers is a 352 issue beyond what is allegedly said by my client."

homies and we are going to throw your property outside in the front yard and I don't care what happened to you all."

Henry understood the term "homies" to mean "gang-related." Henry initially testified the term "Seven-Trey Hustlers" meant nothing to her. The term "Seven-Trey" did not bother Henry; what bothered Henry was the fact that appellant said he was going to get his "homies." Henry testified this bothered her because if appellant was threatening her, appellant, and not others, should do this.

Henry later testified that, to her, the term "Hustlers" meant a gang. The prosecutor later asked Henry how she knew that the term "Hustlers" meant a gang, and she replied "Actually I really don't know that, but when I called the law they told me." After the trial court advised Henry that it did not want hearsay, she replied that she really did not know.

After appellant told Henry that he was going to get his "homies" and throw everything out of the house, he left. Henry was afraid because her kids were in the house. She was afraid of appellant and his "homies" killing her and hurting her kids. Henry did not know where Leverett was at the time. The jury acquitted appellant on counts 1 and 3, and convicted him on counts 2 and 4. We will present additional facts below where pertinent.

b. *Analysis.*

(1) *Appellant's Statements About His Gang Membership and "Homies" Were Admissible, and the Trial Court Did Not Erroneously Fail to Admonish the Jury to Disregard Henry's Gang Testimony.*

Appellant claims that evidence of appellant's statement that he was a Seven-Trey Hustlers gang member was irrelevant, and excludable under Evidence Code section 352.[2]

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[2] During discussions concerning the admissibility of appellant's statements, appellant's counsel made comments which arguably amounted to (1) a concession that appellant's statements were admissible, but (2) an objection to the introduction of any gang evidence other than appellant's statements. (See, e.g., fn. 1.) Respondent does not argue that appellant waived any admissibility issue; therefore, there is no need for us to

We disagree. Evidence Code section 210, states, in pertinent part, that "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 350, states: "No evidence is admissible except relevant evidence."

Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court enjoys broad discretion under Evidence Code section 352, in assessing whether probative value outweighs undue prejudice, confusion, or consumption of time. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.) An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning relevance or Evidence Code section 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725.)

We note at the outset that appellant concedes that Henry's gang testimony "was confined to the August 31, 2005, incident." That incident was the subject of count 1 only.

Moreover, in the present case, the prosecutor initially proffered only evidence of appellant's statement that he was a member of the Seven-Trey Hustlers. However, during the ensuing discussion, the court noted that appellant said something to the effect that "I am going to get you out of here. My homies, Seven-Trey . . . ." The prosecutor then indicated that this was the very essence of appellant's threats. The prosecutor later commented, "[Appellant's] saying not only am I a Seven-Trey Hustler, but I am going to get my homies to come back and do this to you."

In sum, fairly read, the record reflects the prosecutor's proffer was that appellant told the victims that he was a member of the Seven-Trey Hustlers and that he was going to get his "homies," who would somehow become involved in the matter. Moreover,

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reach the issue of whether appellant waived the admissibility issue by failing to object below to the statements.

Henry in fact testified that appellant said ". . . I am from Seven-Trey Hustlers and I am going to get my homies and we are going to throw your property outside in the front yard and I don't care what happened to you all."

In *People v. Toledo* (2001) 26 Cal.4th 221 (*Toledo*), our Supreme Court stated, in relevant part, "In order to prove a violation of [Penal Code] section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat -- which may be 'made verbally, in writing, or by means of an electronic communication device' -- was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo, supra*, 26 Cal.4th pp. 227-228.)

Henry's testimony that appellant said, ". . . I am from Seven-Trey Hustlers and I am going to get my homies and we are going to throw your property outside in the front yard and I don't care what happened to you all" was relevant, as to count 1, to the issues of whether appellant made a threat and satisfied the first, second, third, and fifth previously enumerated elements of Penal Code section 422. The trial court also correctly concluded the testimony was not excludable under Evidence Code section 352. (Cf. *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1455-1456; *People v. Plasencia* (1985) 168 Cal.App.3d 546, 552; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140.)

The fact that Henry testified that the term "Seven-Trey Hustlers" meant nothing to her does not compel a contrary conclusion. The jury reasonably could have concluded that Henry was afraid, not merely because appellant had said that he was a gang member,

but because appellant had said that he was a gang member and that he was going to get his "homies." The jury also reasonably could have discounted as false bravado Henry's profession that she did not fear the Seven-Gray Hustlers. (See *People v. Borra* (1932) 123 Cal.App. 482, 484.) Moreover, leaving aside the reference to the Seven-Trey Hustlers, we note that one of the definitions of the term "homie" is "a member of one's . . . gang."[3]

We similarly reject appellant's related claim that the trial court should have admonished the jury sua sponte to disregard the evidence related to the Seven-Trey Hustlers because the prosecutor previously misadvised the trial court that Henry would testify that appellant's gang membership caused her to fear. Fairly read, the record reflects the prosecutor proffered testimony from Henry that appellant said he was a member of the Seven-Trey Hustlers *and* that he was going to get his "homies," who would somehow be involved. Henry's actual testimony was consistent with the proffer.

Finally, even if the trial court erred by admitting into evidence Henry's gang testimony or by failing to admonish the jury to disregard it, there is no need to reverse the judgment. As mentioned, appellant concedes that Henry's gang testimony was confined to the August 31, 2005 incident. That incident was the subject of count 1 only. Appellant was acquitted on count 1.

On the other hand, count 2 pertained to an incident which occurred on September 7, 2005 (not August 31, 2005), in which Leverett (not Henry) was the victim. Henry testified about the September 7, 2005 incident, but appellant concedes that when she testified about that incident, she "said nothing about appellant mentioning the Seven-Trey Hustlers or his homies." Appellant similarly concedes that when Leverett testified about the September 7, 2005 incident, he "said nothing about appellant claiming to be a Seven-Trey member."

Henry testified she did not know where Leverett was on August 31, 2005. Appellant cites nothing from the record indicating that Leverett heard appellant's

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3 (Oxford English Dict., <http://www.oed.com> [as of October, 2008].)

August 31, 2005 statement to Henry, or that, if Leverett heard it, the statement impacted the events of September 7, 2005, at issue in count 2. In sum, appellant's August 31, 2005 statement to Henry was wholly irrelevant to count 2, which involved appellant's September 7, 2005 threats and display of a gun to Leverett. As discussed in part 3, there was sufficient evidence supporting appellant's conviction on count 2; this is true independent of any evidence of appellant's August 31, 2005 threat to Henry. In light of the above, the alleged evidentiary and instructional errors were not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)[4] Any prosecutorial references to gang evidence during jury argument do not compel a contrary conclusion.

(2) *Appellant Was Not Denied Effective Assistance of Counsel.*

Appellant claims that, if respondent contends, and this Court agrees, that appellant waived viable objections to the evidence of appellant's gang membership, then his trial counsel provided ineffective assistance of counsel. However, respondent does not contend that appellant waived any issues; nor do we conclude such a waiver occurred. Moreover, in light of the previous analysis, appellant has failed to demonstrate that the performance of his trial counsel was constitutionally deficient, or that any such deficiency was prejudicial. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

2. *Sufficient Evidence Supported Appellant's Conviction on Count 2.*

We have recited the pertinent facts as to count 2 (involving victim Leverett) in our Factual Summary. Moreover, we note that the other crimes evidence, the admissibility of which is undisputed, was strongly probative of appellant's intent that Leverett take appellant's statements as a threat. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) We reject appellant's suggestion that appellant merely "made threats to evict Mr. Leverett and his family using self-help rather than through an unlawful detainer legal procedure." We conclude there was sufficient evidence that appellant committed criminal threats as alleged in count 2. (Cf. *People v. Toledo, supra,* 26 Cal.4th pp. 227-228; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206; Pen. Code, § 422.)

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[4] The gang evidence was also wholly irrelevant to count 4 and, therefore, reversal of the judgment of conviction as to count 4 is not warranted.

3. *The Trial Court Properly Denied Appellant's Motion for a New Trial.*

a. *Pertinent Facts.*

The jury convicted appellant in June 2006. In April 2007, appellant filed a motion for a new trial based on newly discovered evidence. The motion was supported by the declaration of appellant's trial counsel, Micheal Curls. The declaration indicated as follows. During several months prior to the trial, Curls tried to locate a witness named Argo. Curls was assisted by Cheryl Dorsey, a court-appointed investigator. Curls and Dorsey checked local prisons and jails, hospitals, county morgues, and other facilities. Curls personally canvassed the 74th Street neighborhood to locate Argo. About October 2006, Dorsey located "Anthony Goodman" or "Arthur Goodman, III" also known as Argo. On October 17, 2006, Dorsey interviewed Goodman. Despite the diligence of Curls and Dorsey, the defense could not have located Goodman prior to trial.

Appellant's motion was also supported by Dorsey's declaration, which indicated as follows. On or about October 17, 2006, Dorsey interviewed Goodman. Goodman stated the following. In September 2005, Goodman witnessed a verbal dispute between appellant and the tenants at the subject home on 74th Street. Goodman and appellant had been standing in front of the location and conversing. The tenant, Leverett, came to the porch of the home. Goodman heard appellant tell Leverett that he needed to pay rent on the property, which was owned by appellant's family.[5]

Appellant and Leverett loudly argued. Shortly after the argument began, Leverett's girlfriend, Henry, stepped outside and joined the argument. Leverett told appellant that Leverett was not going to pay the rent, and Leverett did not have to discuss the matter with appellant. Henry became more involved in the argument and appellant asked Leverett what man would let his woman talk for him. Appellant told Leverett that appellant was not going to argue with a woman.

Leverett threatened that if he came outside he would have a weapon. Leverett dared appellant to approach the front porch. Goodman was standing close to appellant

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5 Curls's declaration recited the above statements by Goodman also.

during the entire conversation, and never heard appellant threaten to kill Leverett or Henry. Appellant told Leverett that he was not going to enter the gated property. Appellant asked Leverett to step outside so the pair could handle their disagreement like men. Appellant eventually left.

Goodman did not see appellant with a handgun, did not see appellant raise his shirt to display a concealed weapon, and did not see appellant gesture as if he had a concealed handgun. If appellant had made threats, Goodman would have been able to hear them, and if appellant had brandished a handgun, Goodman would have been able to see this. Goodman was surprised to learn of appellant's incarceration. If Goodman had known about appellant's incarceration, Goodman would have confronted Leverett about his false allegations.

After argument on the motion, the court indicated Goodman's statement was being presented over a year after the incident, there was no supporting declaration from Goodman, and his statement was hearsay. However, the court indicated it would assume Goodman's hearsay statement was true.

Appellant advised the court that appellant could secure Goodman's attendance at the hearing if the court wanted appellant to do so. The court reiterated it would assume Goodman's statement was true because all the court had was "statements of what he would have said." The court then stated, "we have a statement that in some ways is helpful to the People. It confirms that there was an incident, that there was this argument about rent payment. Although we've got three separate instances that are alleged, it's unclear as to which one Mr. Goodman would have been referring to. And even then, we are talking about a crime of words. . . . [P]eople can often hear or see things differently and indeed the jury is so instructed. So it's unclear as to whether that would have made any difference at all. I just don't think that the defense has met their burden to warrant a court granting a new trial on that basis. [¶] So for that reason, the court will be denying the motion for a new trial."

b. *Analysis.*

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '". . . 3. That [the evidence] be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*Ibid*.) A motion for a new trial based on the ground of newly discovered evidence is looked upon with disfavor. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 485-486.)

In the present case, insofar as appellant's motion sought to demonstrate that the testimony of Goodman could not with reasonable diligence have been discovered and produced at the trial, we note the supporting declarations alleged no dates (prior to October 2006) of the alleged pretrial efforts of Curls and Dorsey to locate Goodman (Argo). Dorsey's declaration effectively began simply with her October 17, 2006 interview of Goodman, and did not detail Dorsey's preceding efforts to locate him.

Moreover, insofar as appellant's motion for a new trial sought to demonstrate that the alleged newly discovered evidence was such as to render a different result probable on a retrial, and that this fact was shown by the best evidence of which the case admitted, appellant's motion was not supported by a declaration from Goodman. Goodman's alleged statements to Dorsey were inadmissible hearsay and, therefore, were inadequate support for the motion. (Cf. *People v. Steele* (1989) 210 Cal.App.3d 67, 73; *People v. Collier* (1952) 113 Cal.App.2d 861, 872; see *People v. Hayes* (1999) 21 Cal.4th 1211, 1256; Evid. Code, § 1200, subds. (a) & (b).) Curls's recitation of Goodman's statements was similarly hearsay. There was ample evidence of appellant's guilt, including the other crimes evidence.

It was appellant's burden to make a properly supported motion, as opposed to waiting until the hearing on the motion to ask if the court wanted appellant to secure the attendance of a defense witness (Goodman) at the hearing. The denial of appellant's motion for a new trial was well within the sound discretion of the trial court.[6]

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.

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6 To the extent the trial court's reasoning differs from ours, we review the trial court's ruling, not its reasoning. (*People v. Mason* (1991) 52 Cal.3d 909, 944.)